

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:FSH:BOS:TL-N-1159-01
MAKnospe

date:

to: District Director, New England District
Attn: Woody Howell, Territory Manager (FSH)

from: District Counsel, New England District, Boston

subject:

Taxable Years [REDACTED], [REDACTED], and [REDACTED]
Statute of Limitations Expires [REDACTED]

This memorandum responds to your request for advice concerning [REDACTED].
This memorandum should not be cited as precedent.

ISSUE

Under the described circumstances, where [REDACTED] merged into another corporation and that corporation underwent a name change, which form should be used to extend the statute of limitations, what language should be included on the form and by whom should the form be signed.

CONCLUSION

The Service should obtain a Form 872 from [REDACTED] [REDACTED], because [REDACTED] is the successor to [REDACTED] for the taxable years ended [REDACTED] [REDACTED], and [REDACTED], and because [REDACTED] is the alternative agent for the [REDACTED] consolidated group pursuant to Temp. Reg. § 1.1502-77T(a)(4)(ii).

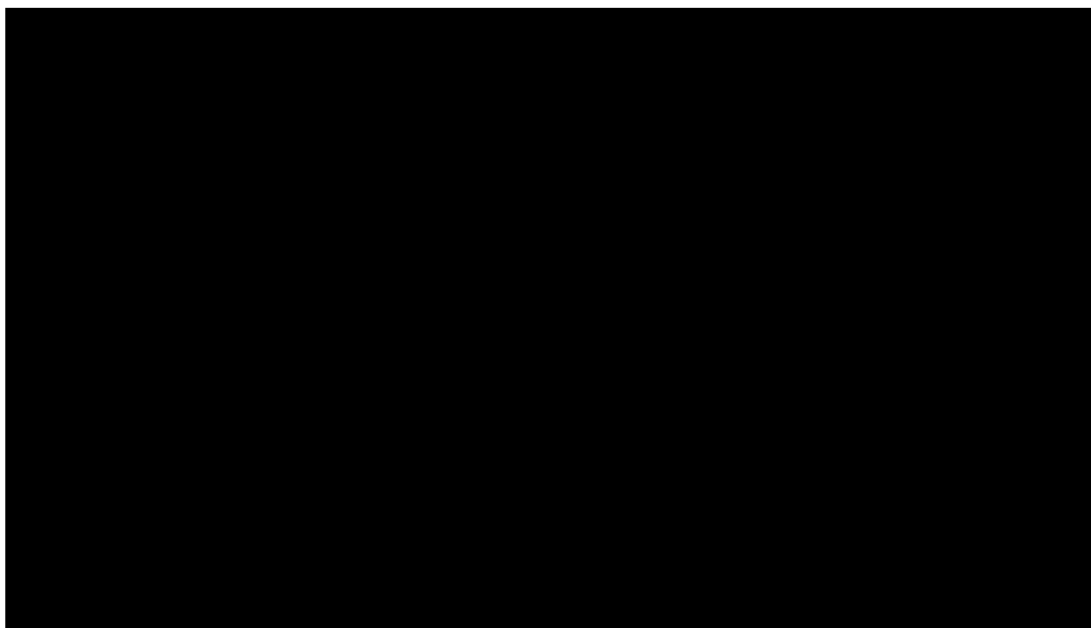
FACTS

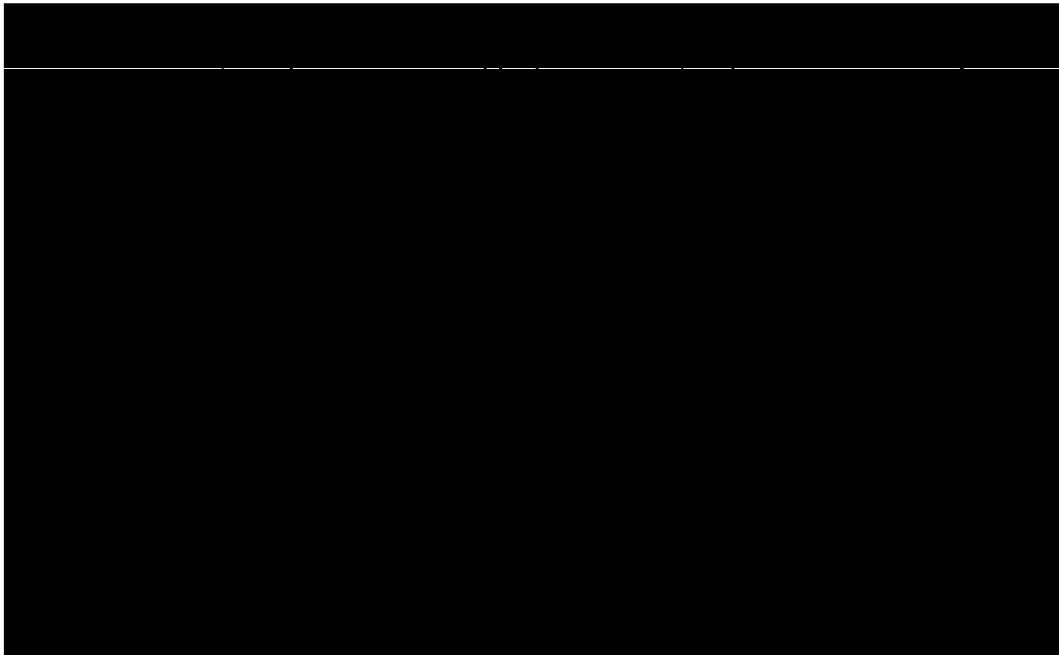
The facts set forth below are as stated in the Agreement and Plan of Merger (Agreement) and additional documents provided by you to this office; we have made no attempt to independently evaluate the accuracy of the information contained in those documents.

Prior to the subject reorganization [REDACTED] was a mutual insurance company duly organized, validly existing and in good standing under the Laws of [REDACTED] Agreement, [REDACTED] was a [REDACTED] mutual insurance company, Agreement, [REDACTED] and [REDACTED] an Illinois mutual insurance company, Agreement, [REDACTED], [REDACTED] and [REDACTED] were members of what was referred to as the [REDACTED] and, as such, had entered into various business relationships with each other and worked closely together in the furtherance of their respective businesses.

The taxpayer filed consolidated corporate income tax returns (Forms 1120) for taxable years [REDACTED] and [REDACTED] in the name of [REDACTED] using the EIN of [REDACTED]. Those returns are now under examination. Each return includes an Affiliations Schedule (Form 851) reflecting [REDACTED] subsidiaries operating in the areas of insurance, real estate, disaster planning, lending, finance, and manufacturing. The returns were signed "[REDACTED]." [REDACTED] executed prior consents on Form 872 for taxable years [REDACTED] and [REDACTED], extending the statutes to [REDACTED]. According to information provided by your office, the statute of limitations for the taxable year [REDACTED] expires on [REDACTED].

The following description of the merger is contained in the Agreement and Plan of Merger of [REDACTED] (Agreement) provided by your office:





On [REDACTED], the effective date of the merger, the members of each of [REDACTED] and [REDACTED] were deemed to have exchanged their membership interests in [REDACTED] and [REDACTED] for membership interests in the surviving company, in full satisfaction of all membership interests in [REDACTED] and [REDACTED]. Policy holders of [REDACTED] and [REDACTED] became policy holders of the surviving company, also in full satisfaction of contract rights pertaining to their respective insurance contracts. Agreement, [REDACTED]. The Merger was intended to have the effects provided in [REDACTED] of the [REDACTED] and [REDACTED]. Agreement, [REDACTED]. [REDACTED] and [REDACTED] ceased to exist and [REDACTED], the surviving company, continued its corporate existence under the Law of the State of Rhode Island under the name "[REDACTED]." Agreement, [REDACTED].

The parties intended the merger to qualify as a reorganization under I.R.C. § 368(a), and [REDACTED] was instructed to report the merger for income tax purposes as a reorganization within the meaning of section 368(a).

According to information provided by your office, [REDACTED], [REDACTED] and [REDACTED] all filed short year returns for the taxable period ending [REDACTED]. [REDACTED] filed a short year return for the period [REDACTED] through [REDACTED] and will be filing a consolidated return for the [REDACTED] calendar year.

DISCUSSION

I.R.C. § 6501(c)(4)(A) provides, in general, that the taxpayer may consent to extend the time to assess tax in an agreement in writing executed by both the Secretary and the taxpayer. I.R.C. § 6501(c)(4)(B) provides, with respect to requests to extend the period of limitations made after December 31, 1999, that the Secretary shall notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent. The Chief Counsel's guidance on this issue provides that the Service personnel may notify taxpayers of their rights under I.R.C. § 6501(c)(4)(B) either orally or in writing. The preferred method of notification is by sending taxpayers Letter 907(DO) (Rev. 2-2000), Letter 907(SC) (Rev. 12-1999), Letter 967 (Rev. 12-1999), or Publication 1035, Extending the Tax Assessment Period (Rev. 12-1999).

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each subsidiary. Treas. Reg. § 1.1502-77(a). Thus, generally, the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-77(a). Treas. Reg. § 1.1502-77(c) provides that, unless the District Director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect of the tax for a consolidated return year, shall be applicable to each corporation which was a member of the group during any part of such taxable year. The common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. § 1.1502-6(a).

Treas. Reg. § 1.1502-77T provides for alternative agents and applies if the corporation that is the common parent of the group ceases to be the common parent, whether or not the group remains in existence. Treas. Reg. § 1.1502-77T(a)(3) provides that a waiver of the statute of limitations, with respect to the consolidated group, given by any one or more corporations referred to in paragraph (a)(4) of the section is deemed to be given by the agent of the group. Subparagraph (a)(4)(i) lists as an alternative agent the common parent of the group for all or any part of the year to which the notice or waiver applies. In this case, the common parent, [REDACTED], is no longer in existence. Therefore, this subparagraph cannot apply.

Under Treas. Reg. § 1.1502-77T(a)(4)(ii), the alternative agents for a group include "a successor to the former common parent in a transaction to which [I.R.C.] section 381(a) applies." I.R.C. § 381(a) applies to an acquisition of assets of a corporation by another corporation in either (1) a distribution to such other corporation to which section 332 (relating to liquidations of subsidiaries) applies, or (2) a transfer to which I.R.C. § 361 (relating to nonrecognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F), or (G) of I.R.C. § 368(a)(1). I.R.C. § 381(a)(1) and (2).

On [REDACTED], [REDACTED] merged with and into [REDACTED] which continued its corporate existence under the name "[REDACTED]". If the merger qualifies as an "A" reorganization, I.R.C. § 381 will apply. If so, pursuant to Temp. Reg. § 1.1502-77T(4)(ii), [REDACTED] would be an alternative agent for the [REDACTED] group for taxable years [REDACTED] and [REDACTED], which are the subject of your request. Any waiver given by [REDACTED] with respect to these pre-merger taxable years of the [REDACTED] consolidated group would be deemed to be given by the agent of the group.

The merger was pursuant to state law. This is one of the requirements of "A" reorganizations. However, to qualify as an "A" reorganization, not only does the merger have to qualify as a merger under state law, but it must also pass the judicially imposed requirements of tax-free reorganization: continuity of interest, continuity of business enterprise, and business purpose. We do not know whether the mergers meet these requirements. If the facts as developed indicate that the mergers were tax-free "A" reorganizations under I.R.C. § 368(a), then I.R.C. § 381 would apply to these reorganizations. If so, the Service can rely on subparagraph (4)(ii) of Temp. Reg. § 1.1502-77T in this case. Accordingly, [REDACTED] would be an alternative agent for the [REDACTED] consolidated group and the proper party to execute a Form 872 with respect to the taxable years [REDACTED], [REDACTED], and [REDACTED] of the [REDACTED] consolidated group. If [REDACTED] has sufficient assets to cover the full extent of the [REDACTED] consolidated group's tax liabilities, then whether or not the transaction qualifies as an "A" reorganization, the Service should, as a fail safe measure, obtain a Form 872 from [REDACTED] with regard to the [REDACTED] consolidated group's tax liabilities.

If the merger does not constitute a tax-free "A" reorganization, [REDACTED] would not qualify as an alternative agent of the [REDACTED] group under Temp. Reg. § 1.1502-77T(a)(4)(ii). Nevertheless, the Form 872 extending the statute of limitations on assessment as to the [REDACTED] consolidated group's [REDACTED]

██████ and ██████ taxable years would be valid at least as to ██████ in its role as a successor. Because ██████ is liable as a successor under the state merger law for the debts of ██████, ██████ is primarily liable for any and all debts of ██████. ██████ is severally liable under Treas. Reg. § 1.1502-6 for the entire amount of the ██████ consolidated group's tax liability for those periods in which it was a member of the group. Thus, ██████ is primarily liable under state law for ██████'s several liability for the entire amount of the ██████'s consolidated group's tax liabilities for each of the taxable years for which you seek extensions, ██████, ██████ and ██████.

As set forth above, we are relying on Temp. Reg. § 1.1502-77T, which treats ██████ as the alternative agent in this case, as a basis for obtaining a Form 872 from ██████. However, another reason for obtaining a Form 872 from ██████ is that ██████ is the successor in interest to ██████. The surviving or resulting corporation in a merger or consolidation under state law may validly sign an extension agreement on behalf of the transferor (predecessor) corporation for a period before the transfer. Rev. Rul. 59-399, 1959-2 C.B. 448. Successor liability may be established in this case.

██ provides:

Effect of Consolidation or Merger. - (a) A Merger or consolidation becomes effective upon the issuance of a certificate of merger or the certificate of consolidation by the secretary of state or on a later date, not more than thirty (30) days after the filing of the articles of merger or the articles of consolidation, as is stated in the plan.

(b) When a merger or consolidation becomes effective:

(1) The several corporations, parties to the plan of merger or consolidation, are a single corporation, which, in the case of a merger, is that corporation designated in the plan of merger as the surviving corporation, and, in the case of a consolidation, is the new corporation provided for in the plan of consolidation.

(2) The separate existence of all corporations, parties to the plan of merger or consolidation, except the surviving or new corporation, ceases.

(3) The surviving or new corporation has all the rights, privileges, immunities, and powers and is subject to all the duties and liabilities of a

corporation organized under this chapter.

(4) The surviving or new corporation at that time and subsequently possesses all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal, and mixed, all debts due on whatever account, including subscriptions to shares, all other choses in action, and all and every other interest of or belonging to or due to each of the corporations merged or consolidated, is taken and deemed to be transferred to and vested in the single corporation without further act or deed; and the title to any real estate, or any interest in real estate, vested in any of the corporations does not revert or is in any way impaired because of the merger or consolidation.

(5) The surviving or new corporation is subsequently responsible and liable for all the liabilities and obligations of each of the corporations merged or consolidated; and any claim existing or action or proceeding pending by or against any of the corporations may be prosecuted as if the merger or consolidation had not taken place, or the surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any corporation is impaired by the merger or consolidation.

(6) In the case of a merger, the articles of incorporation of the surviving corporation are deemed to be amended to the extent, if any, that changes in its articles of incorporation are stated in the plan of merger; and, in the case of consolidation, the statements in the articles of consolidation and which are requested or permitted to be stated in the articles of incorporation of corporations organized under this chapter are deemed to be the original articles of incorporation of the new corporation.

(7) The shares of the corporation or corporations party to the plan that are, under the terms of the plan, to be converted or exchanged, cease to exist, and the holders of the shares are entitled only to the shares, obligation, other securities, cash, or other property into which they have been converted or for which they have been exchanged in accordance with the plan, subject to any rights under [REDACTED]

██████████ provides that the effect of a merger of one or more corporations duly organized under the laws of other states with one or more domestic corporations, as in the instant case, would be the same, if the surviving or new corporation is to be governed by the laws of ██████████
██████████

██████████ provides that a domestic company "may merge under the laws of any state of the United States, other than this commonwealth, into a foreign company, incorporated under the laws of such state and duly authorized to transact in the commonwealth the same class or classes of business as such domestic company or companies . . . under the laws of such state, and form a continuing corporation or a new corporation under such laws" ██████████
██████████

The ██████████ provides as follows, with respect to the effect of a merger where the surviving or new company is not a domestic company:

- (2) If the surviving or new company is a foreign or alien company, when such merger or consolidation has become effective in this State
 - (a) the effect of the merger or consolidation shall be determined by the law of the state of incorporation or organization of such company;
 - (b) the separate existence of all domestic companies parties to the plan of merger or consolidation shall cease;
 - (c) all property, real, personal, and mixed, and all debts due on whatever account including subscriptions to shares, assessments payable from members or policyholders and all other choses in action and all and every other interest of or belonging to and due to each of the companies so merged or consolidated shall be taken and deemed to be transferred to and vested in such surviving or new company without further act or deed, and the title to any real estate, or any interest therein, shall not revert or be in any way impaired by reason of such merger or consolidation.
 - (3) In the event of a merger or consolidation under this article, the surviving company or the consolidated companies shall be considered as having the age of the oldest company which is a party to such merger or consolidation for purposes of complying with requirements of the laws relating to age of company.
- ██████████
██████████

The merger of [REDACTED] and [REDACTED] with and into [REDACTED] was pursuant to Rhode Island corporate law. Both the Massachusetts and Illinois Insurance Laws provide for such mergers. [REDACTED] immediately changed its name to [REDACTED].

If, as it appears, the merger of [REDACTED] into [REDACTED] formerly known as [REDACTED], was effected under Rhode Island law, then [REDACTED] is primarily liable for [REDACTED]'s debts, including taxes due. Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387 (1985), later proceeding, 90 T.C. 771 (1988).

We recommend that you obtain a Form 872 for [REDACTED] and [REDACTED]. The Form 872 should be captioned as follows: "[REDACTED] (EIN: XX-XXXXXXX), formerly [REDACTED] successor to [REDACTED] (EIN: [REDACTED], and as alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii).*" On the bottom of the Form 872, you should add the following: "*With respect to the consolidated tax liability of [REDACTED] (EIN: [REDACTED] and [REDACTED] for the taxable years ending [REDACTED], [REDACTED] and [REDACTED]." This Form 872 should be signed by an authorized officer or director of [REDACTED]. Rev. Rul 83-41, 1983 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. The current Letter 907 and Publication 1035 should be provided to the taxpayer when the consent is solicited.

Under I.R.C. § 6901 and Treas. Reg. § 301.6901-1(b), a surviving corporation in a merger is also secondarily liable as a transferee, because a transferee at law includes a successor of a corporation. A determination against the surviving corporation for tax due by the merged corporation for a period prior to the merger is not generally handled as a transferee case. Rather, it should generally be handled by asserting primary liability against the surviving corporation. (There is an exception if the statutory period for assessing a deficiency has expired under primary liability; the Service would then argue that the surviving corporation should be liable as a transferee. See generally CCDM (35)(10)61.) We believe that the established facts will support the Service's primary reliance on [REDACTED]'s liability as an alternative agent pursuant to Temp. Reg. § 1.1502-77T(a)(4)(ii), and as a successor by merger under state law. The use of the Form 872 to extend the statute of limitations with respect to [REDACTED] is adequate, therefore, and need not be supplemented by the use of a Form 977, Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary at this time. This will not prevent consideration of transferee liability assessments, if appropriate, at a later time.

Please contact attorney Marvis A. Knospe at (617) 565-7914 if you need further assistance in this matter. There are no files to be returned to you.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views

DAVID BRODSKY
Associate Area Counsel
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By: _____
MARVIS A. KNOSPE
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cc: Roland Barral, Area 1 Counsel (LMSB)
Nancy Knapp, Area 1 Senior Legal Counsel (LMSB)